**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| In re ENRON CORPORATION SECURITIES LITIGATION | Civil Action No. H-01-3624 (Consolidated) |
| This Document Relates To: | |
| MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants. | |

**MOTION OF DEFENDANT BARCLAYS PLC FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT**

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Defendant Barclays PLC respectfully submits this memorandum of law in support of its motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 dismissing plaintiffs' claim against it under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. As demonstrated below, Barclays PLC is entitled to summary judgment on this claim because (i) Barclays PLC did not engage in any of the activities that are alleged in the Consolidated Complaint (the "Complaint") as the basis for the claim, and (ii) Barclays PLC cannot be liable for activities of its separately incorporated subsidiaries.[1]

**Preliminary Statement**

As the Court is aware, the Complaint alleges that defendants, including Barclays PLC, participated in a fraudulent scheme to inflate the price of Enron stock through misrepresentations contained in Enron's prospectuses and registration statements. The Complaint does not allege that Barclays PLC made any actionable statements concerning Enron. Rather, it alleges that Barclays PLC participated in an illicit financing that purportedly facilitated the subsequent publication by Enron of fraudulent financial statements, and otherwise provided Enron with commercial and investment banking services that are not themselves alleged to have been fraudulent.

The Court should grant Barclays PLC summary judgment because the indisputable facts demonstrate that Barclays PLC did not engage in any of the activities alleged to have violated Section 10(b) and Rule 10b-5. As set forth in Barclays PLC's

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[1] In prior orders, the Court invited the bank defendants to file motions if they contend that they are not proper party defendants. (*See* 12/20/02 Order at 177 n.85 and 4 n.5; 1/27/03 Order at 2.)

Answer to the Complaint and in the affidavit and declarations accompanying this motion, two subsidiaries of Barclays PLC — Barclays Capital Inc. and Barclays Bank PLC — and not Barclays PLC itself, provided the commercial and/or investment banking services at issue to Enron.[2] The indisputable facts also demonstrate that the conduct of these two subsidiaries cannot properly be imputed to Barclays PLC because the subsidiaries are and were at all relevant times adequately capitalized, legally distinct entities carrying on their own business activities. As shown below and in the attached affidavit and declarations, there is no legal basis to disregard the separate legal identities of Barclays PLC and its subsidiaries. Accordingly, this Court should grant summary judgment dismissing the Section 10(b) and Rule 10b-5 claim against Barclays PLC.[3]

## STATEMENT OF INDISPUTABLE FACTS

Defendant Barclays PLC is a public limited liability company incorporated in England and Wales. Barclays PLC is a holding company — not an operating company — whose subsidiaries engage primarily in commercial banking,

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[2] An affidavit and declarations from representatives of Barclays PLC, Barclays Capital Inc. and Barclays Bank PLC, respectively, have been separately filed and bound as Exhibits ("Exh.") 1-3.

[3] Barclays PLC also has pending a motion to dismiss plaintiffs' Section 20(a) claim because there is no allegation in the Complaint that Barclays PLC is a "control person" for purposes of Section 20(a). (*See* Barclays PLC Mem. Law, 5/8/02, at 2 n.2.) Although the Court noted in its December 20 Order that Lead Plaintiff did not address "the question of controlling person liability in its response to the secondary-actor Defendant's arguments," the Court deferred "ruling on the issue under [Section 20(a)] until it has thoroughly reviewed all the individual Defendants' motions." (12/20/02 Order at 268-69.) Because the Court has now ruled on all of the individual defendants' motions to dismiss, it should dismiss the Section 20(a) claim asserted against Barclays PLC for failure to state a claim, especially given Plaintiffs' failure to oppose Barclays' motion to dismiss on this ground. *See Patton* v. *United Parcel Serv.*, 910 F. Supp. 1250, 1280 (S.D. Tex. 1995) ("unopposed motions [to dismiss] are routinely granted").

investment banking and asset management activities. (*See* Declaration of Patrick Anthony Gonsalves, dated May 2, 2003 ("Gonsalves Decl."), ¶ 5.) Barclays PLC did not participate in any transactions with Enron. (*See id.* ¶ 8.)

Barclays Bank PLC ("Barclays Bank") — which is not named as a defendant in this action — is a public limited liability company incorporated in England and Wales. (*See* Declaration of Deirdre Ann Parry, dated May 2, 2003 ("Parry Decl."), ¶ 3.) Barclays Bank is a wholly owned subsidiary of defendant Barclays PLC, and is the principal operating subsidiary of Barclays PLC. Barclays Bank is engaged in banking operations in both the United Kingdom and overseas. (*See id.* ¶ 8.) Although all the issued common stock of Barclays Bank is owned by Barclays PLC, Barclays Bank is and operates as a separate entity, legally distinct from Barclays PLC. (*See id.* ¶¶ 4-5.) Barclays Bank has its own books and records, bank accounts, accounts receivable, lines of credit and other assets. (*See id.* ¶ 7.)[4] Barclays Bank is, and has always been, adequately capitalized in relation to its business activities. (*See id.* ¶ 9.)

Unlike its parent holding company, Barclays Bank from time to time provided banking services and participated in loans to Enron, its affiliates and related entities. For example, Barclays Bank loaned approximately $240 million to Chewco and approximately $11.4 million to entities that invested in Chewco. (*See id.* ¶ 11.) In February 2000, Barclays Bank also participated in the non-public offering of

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[4] Although the Barclays Bank and Barclays PLC boards of directors have the same members and have common meetings, they separately record and maintain minutes of their meetings. (*See* Gonsalves Decl. ¶ 6; Parry Decl. ¶ 6.) Common board membership is typical of the parent-subsidiary relationship, and is not by itself a basis for disregarding the legal separateness between Barclays Bank and Barclays PLC. (*See infra n.* 10.)

£200,000,000 of 8.75% Enron Linked Obligations issued by Yosemite Securities Company Ltd. (*See id.* ¶ 11.) The Chewco transaction and the Yosemite offering are the subject of allegations in plaintiffs' Complaint. (*See, e.g.*, Compl. ¶¶ 473-474, 750, 751, 753, 756-759.)

Barclays Capital Inc. ("Barclays Capital") — which also is not named as a defendant in this action — is a limited liability company incorporated in Connecticut. (*See* Affidavit of Julie Grossman, dated May 6, 2003 ("Grossman Aff."), ¶ 3.) Barclays Capital is a wholly owned subsidiary of Barclays Group US Inc., which in turn is a wholly owned subsidiary of Barclays Bank. Barclays Capital provides underwriting and broker-dealer services. It is and operates as a separate entity, legally distinct from its ultimate parent, Barclays PLC. (*See id.* ¶¶ 4, 8.) The board of directors of Barclays Capital conducts its own board meetings, and separately records and maintains the minutes thereof. (*See id.* ¶ 6.) Barclays Capital has its own books and records, bank accounts, accounts receivable, lines of credit and other assets. (*See id.* ¶ 7.) Barclays Capital is, and has always been, adequately capitalized in relation to its business activities. (*See id.* ¶ 5.)

With respect to transactions involving Enron that are addressed in the Complaint, Barclays Capital was one of the financial institutions that agreed to purchase (but ultimately did not itself purchase, sell or resell) certain Zero Coupon Convertible Senior Notes from Enron in February 2001 for resale to Qualified Institutional Buyers in a non-public offering. (*See id.* ¶ 9; Compl. ¶ 752.)

## STANDARD ON THIS MOTION

Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In opposing summary judgment, the non-movant may not rely on conclusory allegations in pleadings, but must set forth sufficient evidence to support a factual dispute warranting adjudication by a trier of fact. *See Whelan* v. *Winchester Prod. Co.*, 319 F.3d 225, 228 (5th Cir. 2003).

## ARGUMENT

### I. THE COURT SHOULD GRANT SUMMARY JUDGMENT DISMISSING THE SECTION 10(b) AND RULE 10b-5 CLAIM AGAINST BARCLAYS PLC.

This Court should grant summary judgment dismissing the Section 10(b) and Rule 10b-5 claim asserted against Barclays PLC. The indisputable facts show that Barclays PLC did not engage in any of the activities alleged against it in the Complaint. Rather, the allegations in the Complaint erroneously directed at Barclays PLC in fact relate entirely to activities of two Barclays PLC subsidiaries, entities that are legally separate and distinct from Barclays PLC.

#### A. Barclays PLC Did Not Engage in any of the Conduct Alleged in the Complaint.

The principal allegations in the Complaint regarding Barclays PLC relate to the Chewco transaction. However, it is an indisputable fact that Barclays Bank, not Barclays PLC, was the entity involved in the Chewco transaction. (*See* Parry Decl. ¶ 11; Gonsalves Decl. ¶¶ 8-9.)

In addition to the Chewco transaction, the Complaint erroneously alleges that Barclays PLC was involved in the following other activities with respect to Enron:

- Barclays PLC is alleged to have purchased certain Zero Coupon Convertible Senior Notes from Enron in February 2001 for resale to Qualified Institutional Buyers in a private placement in February 2001. (*See* Compl. ¶ 752.) However, it was Barclays Capital — not Barclays PLC — that agreed to participate in this transaction (although neither Barclays Capital nor any of its affiliates ever purchased, sold or resold any such notes). (*See* Grossman Aff. ¶ 9.)

- Barclays PLC is alleged to have participated in a non-public offering of £200,000,000 of 8.75% Linked Enron Obligations issued by Yosemite Securities Company Ltd. in February 2000. (*See* Compl. ¶ 753.) However, Barclays Bank — not Barclays PLC —participated in this transaction. (*See* Parry Decl. ¶ 11; Gonsalves Decl. ¶¶ 8-9.)

- Barclays PLC is alleged to have been one of the principal commercial lending banks to Enron, participating in various loans to Enron and its affiliates and related entities during the class period alleged in the Complaint. (*See* Compl. ¶ 754.) Here again, Barclays Bank — not Barclays PLC — participated in these transactions. (*See* Parry Decl. ¶ 11; Gonsalves Decl. ¶¶ 8-9.)

In short, Barclays PLC did not engage in any of the activities that are alleged in the Complaint to have violated Section 10(b) and Rule 10b-5. As such, Barclays PLC is entitled to summary judgment dismissing the Section 10(b) and Rule 10b-5 claim.

### B. Barclays PLC Is Not Primarily Liable for the Conduct of Its Subsidiaries.

Because the indisputable facts establish that the allegations in the Complaint concern conduct in which Barclays PLC had no involvement, Barclays PLC can only be primarily liable under Section 10(b) and Rule 10b-5 if the conduct of its subsidiaries can properly be imputed to it by piercing the corporate veil, disregarding the legal separateness between Barclays PLC and its subsidiaries, and effectively treating all

the entities as the same. *See Patin* v. *Thoroughbred Power Boats Inc.*, 294 F.3d 640, 654 (5th Cir. 2002) (observing that "underlying rationale justifying piercing of corporate veil [is that] those entities are considered to be one and the same under the law" where the acts of one are deemed to be acts of the other); *see also United States* v. *Jon-T Chem., Inc.*, 768 F.2d 686, 696 (5th Cir. 1985) (purpose of veil-piercing doctrine is to determine whether one corporation is vicariously liable for another's actions and whether acts of one that allegedly engaged in wrongdoing are to be considered acts of the other that did not).

Judicial disregard of the legal separateness between corporate entities, or "veil-piercing," is a rare exception to the general rule that a parent is not liable for the acts of its subsidiaries. *See United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries."); *Anderson* v. *Abbott*, 321 U.S. 349, 362 (1944) ("Limited liability is the rule[,] not the exception."); *see also Salomon* v. *A. Saloman & Co.*, A.C. 22, 51 (H.L. 1897) (under English law, parent corporation has legal personality distinct from its subsidiaries, and the general rule is that a parent and subsidiary are treated as separate legal entities); *SFA Folio Collections, Inc.* v. *Bannon*, 585 A.2d 666, 673 (Conn. 1991) (observing under Connecticut law "[the] fundamental principle of corporate law that 'the parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares in the subsidiary and the two enterprises have identical directors and officers.'")

Whether the corporate veil of Barclays PLC's subsidiaries should be pierced presents a choice-of-law question, which, because this case is predicated on

federal question jurisdiction, is governed by the Restatement (Second) of Conflicts. *See In re Catfish Antitrust Litigation*, 908 F. Supp. 400, 411 (N.D. Miss. 1995). Section 307 of the Restatement provides that the issue of whether the corporate veil should be pierced is determined by the law of the state in which the subsidiary is incorporated. *See* RESTATEMENT (SECOND) OF CONFLICTS § 307 (1971).[5] The entities that were allegedly involved in the transactions alleged in the Complaint — Barclays Bank and Barclays Capital — are incorporated in the United Kingdom and Connecticut, respectively. (*See* Parry Decl. ¶ 3; Grossman Aff. ¶ 3.) Consequently, the veil-piercing question here is governed by the laws of these two jurisdictions.

Under English law, a parent corporation can be liable for the conduct of its subsidiary when "special circumstances exist indicating that [the relationship of one corporation to another] is a mere façade concealing the true facts." *Woolfson* v. *Strathclyde Reg'l Council*, S.L.T. 159 at para. 8 (H.L. 1978); *Yukong Lines Ltd.* v. *Rendsburg Invs. Corp.*, 2 B.C.L.C. 485, 494 (Q.B. 1998).[6] Under English law principles, courts will not impose liability on a parent corporation solely because the subsidiary was allegedly involved in some improper, even fraudulent, activity unless the impropriety was

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[5] The same result obtains under Texas' choice-of-law principles. *See Amoco Chem. Co.* v. *Tex Tin Corp.*, 925 F. Supp. 1192, 1201 (S.D. Tex. 1996) (applying Texas choice-of-law principles and citing Restatement (Second) of Conflicts § 307, holding that law of state of incorporation applies in determining whether corporate veil should be pierced); *Weaver* v. *Kellogg*, 216 B.R. 563, 585 (S.D. Tex. 1997) (under Texas choice-of-law rules, shareholder liability determined by law of state of incorporation).

[6] Pursuant to Federal Rule of Civil Procedure 44.1, Barclays PLC submits the Declaration of Paul Girolami, Q.C., dated May 2, 2003 ("Girolami Decl." attached as Exh. 4), which sets forth the circumstances under English law in which a corporation's legal form may be disregarded for the purpose of imputing the liability of a subsidiary to its parent corporation.

linked to the misuse of the corporate structure for the purpose of avoiding or concealing liability for the purportedly improper conduct. (*See* Girolami Decl. ¶ 14(2) (citing *Trustor* v. *Smallbone* 1 W.L.R. 1177 at para. 22 (Ch. 2001); *see also Yukong Line* v. *Rendsburg Invs. Corp.* 2 B.C.L.C. 485, 494 (Q.B. 1998); *Yorkshire Metro. Props. Ltd.* v. *Coop. Retail Servs. Ltd.*, L. & T.R. 26 at para. 135 (Ch. 1997) (veil-piercing power is one that courts "should be slow to exercise")).

The only other potentially applicable theory here for piercing the corporate veil under English law is the "agency exception," a theory sparingly applied. (*See* Girolami Decl. ¶ 19 (citing *Polly Peck* [1996] 2 All ER 433).) The agency exception generally concerns cases in which an entity has ostensibly transacted as a principal, but in fact acted as a mere nominee or agent. The facts supporting such a theory include the same sort of facts suggestive of a "corporate façade,"[7] such as where the entity has no capital, no separate offices, no bank account, and/or where the entity does not receive economic benefit for the transactions it undertakes, but instead passes them along to the entity alleged to be the true principal. *See Adams* v. *Cape Industries plc*, 1 ALL ER 929 (C.A. 1999) (discussing cases); *see also* Girolami Decl. ¶ 18. No such facts exist here.

Veil-piercing is equally disfavored by Connecticut law: a corporate veil will be pierced only under "exceptional circumstances, [such as] where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to

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[7] Indeed, despite the varying formulations used in this context — alter ego, piercing corporate veil, instrumentality and agency theories — courts have recognized that "regardless of the precise nomenclature employed, the contours of the [veil-piercing] theory are the same." *Mobil Oil Corp.* v. *Linear Films, Inc.*, 718 F. Supp. 260, 266 (D. Del. 1989).

perpetuate fraud or promote injustice." *SFA Folio Collections*, 585 A.2d at 672 (citation omitted). As under English law, Connecticut courts recognize that "only rarely should the corporate veil be pierced." *Banks* v. *Vito*, 562 A.2d 71, 75 (Conn. Ct. App. 1989). Short of outright fraud in the establishment of the subsidiary, the exceptional circumstances that warrant disregard of the general rule involve the complete domination of the finances, business policies and practices of one entity by the other, or the complete failure to adhere to the formalities of separation between the two, in both cases amounting to the factual absence of independence between the corporations. *See Angelo Tomasso, Inc.* v. *Armor Constr. & Paving, Inc.*, 447 A.2d 406, 410-413 (Conn. 1982). Again, there are no such facts here.

Thus, regardless of which jurisdiction's law applies, Barclays PLC cannot be primarily liable under Section10(b) and Rule 10b-5 for the acts of its subsidiaries absent a showing of fraud or other exceptional circumstances. *See* Girolami Decl. *passim*; *see also Matter of Multiponics, Inc.*, 622 F.2d 709, 725 (5th Cir. 1980) (veil-piercing doctrine reserved for cases in which corporate entity used "as a sham to perpetrate a fraud, to shun personal liability, or to encompass other truly unique situations").[8] Here, there is nothing to suggest that Barclays Capital and Barclays Bank

[8] *See also Woolfson*, S.L.T. 159 at para. 8; *SFA Folio Collections*, 585 A.2d at 672 (citation omitted).

are sham entities, and no special circumstances warrant disregarding their corporate form.[9] (*See* Grossman Aff. ¶¶ 4-8; Gonsalves Decl. ¶¶ 4-7; Parry Decl. ¶¶ 4, 6-10.)

Indeed, the incontrovertible facts show that Barclays Capital and Barclays Bank are separate legal entities, independently operated and controlled, and adequately capitalized in relation to their business activities. (*See* Parry Decl. ¶¶ 9-10; Grossman Aff. ¶¶ 4-5, 8.) In addition to this substantive independence, those entities have meticulously observed the requisite corporate formalities of separateness. For example, Barclays Bank and Barclays Capital keep and maintain their own books and records, bank accounts, accounts receivable, lines of credit and other assets. (*See* Parry Decl. ¶ 7; Grossman Aff. ¶ 7.) In addition, their boards of directors separately record and maintain minutes of their meetings.[10] (*See* Parry Decl. ¶ 6; Grossman Aff. ¶ 6.)

Because Barclays PLC indisputably did not engage in any transactions with Enron, and because there is no basis for imputing liability to Barclays PLC for the alleged conduct of its subsidiaries, Barclays PLC is entitled to summary judgment dismissing the Section 10(b) and Rule 10b-5 claim. *See Seymore* v. *Lake Tahoe Cruises, Inc.*, 888 F. Supp. 1029, 1036 (E.D. Cal. 1995) (granting summary judgment in favor of sole shareholder of corporation where corporation engaged in acts in question and there was no evidence to warrant piercing corporate veil); *see also Chill* v. *General Elec. Co.*,

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[9] Plaintiffs bear the burden of proof in seeking to depart from the well-established general rule that a parent corporation is not liable for the acts of its subsidiaries. *See In re Alta Industries, Inc.*, 53 B.R. 567, 569 (W.D. Tex. 1985) (burden rests on party seeking to pierce corporate veil).

[10] Although the boards of directors of Barclays PLC and Barclays Bank have the same members and have common meetings, they separately record and maintain minutes of those meetings. In any event, overlapping directors is not by itself a basis for veil piercing. *See* Girolami Decl. ¶ 17; *see also SFA Folio Collections*, 585 A.2d at 672 (citation omitted).

101 F.3d 263, 268 (2d Cir. 1996) (dismissing Section 10(b) claim against corporate parent because plaintiffs' allegations ignored fact that whether subsidiary violated Section 10(b) and whether parent did the same are "different questions"); *Mobil Oil Corp.*, 718 F. Supp. at 267 (granting defendant-parent corporation's motion for summary judgment where all allegations related to subsidiary, holding that parent corporation can be held liable for acts of its subsidiary "only if its use of the corporate form would, if left unchecked, work as a fraud or something in the nature of a fraud").[11]

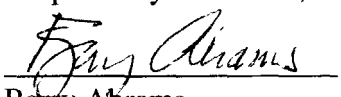
[11] *See also* 10A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2729 (3d. 1998) (observing that summary judgment is warranted when defendant can show that "plaintiff has named the wrong party as defendant, or that defendant has any other ironclad legal defense."); *Sanders* v. *Venite of Philadelphia, Inc.*, 39 F.R.D. 55, 56 (E.D. Penn. 1965) (granting summary judgment in favor of defendant-corporation where allegations involved activities of corporate relative).

## CONCLUSION

The indisputable facts show that Barclays PLC did not engage in any of the conduct alleged in the Complaint, and that Barclays PLC is not liable for the conduct of its subsidiaries. Accordingly, the Court should grant summary judgment dismissing the Section10(b) and Rule 10b-5 claim against Barclays PLC.

Dated: May 7, 2003
Houston, Texas

Respectfully submitted,



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## CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Motion and accompanying Affidavit and Declarations have been served upon all counsel of record via the www.esl3624.com website, Newby v. Enron Corp. et al., on this 7th day of May, 2003.

Jeffrey T. Scott